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No. 10-896

IN THE

Supreme Court of the United States

HARRISON CENTRAL APPRAISAL DISTRICT,

Petitioner,

v.

THE PEOPLES GAS, LIGHT AND COKE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the Texas Court of Appeals, Sixth Appellate District

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether under the well-settled, multi-factor test set forth in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), a local taxing authority may assess a personal property tax on an out-of-state company engaging in interstate commerce based on a deemed after-the-fact allocation of natural gas temporarily stored in the taxing authority's jurisdiction on a particular day while being shipped interstate, where the company has no contacts with the jurisdiction, cannot control where any gas is stored, has no right to control the disposition of any gas in the jurisdiction, and contracts for its gas to be stored in a different state.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding are set forth in the caption.

Pursuant to Sup. Ct. R. 29.6, respondent The Peoples Gas Light and Coke Company states that its parent companies are Peoples Energy LLC and Integrys Energy Group, Inc., and that no other publicly held company owns 10% or more of respondent's stock.

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BRIEF IN OPPOSITION

INTRODUCTION

Petitioner Harrison Central Appraisal District ("the District") asks this Court to correct a purported error by an intermediate state court on a concededly "narrow" issue. Pet. 4, 10, 11. It attempts to justify this request by claiming that the opinion below conflicts with a Supreme Court of Oklahoma decision. This Court declined to review the Oklahoma case only last year, and there is no reason for a different outcome here.

First, just as when the Court denied certiorari in *In re Assessment of Personal Prop. Taxes Against Mo.*

Gas Energy, 234 P.3d 938 (Okla. 2008) ("*Missouri Gas*"), there remains no conflict between state courts of last resort. The Texas Supreme Court has not addressed the issue, and both the Commerce Clause issue and the state law property and tax issues that underlie the federal question therefore remain unresolved in Texas.

Second, as then-Solicitor General Kagan stated in her brief in *Missouri Gas*, there is no conflict as to the governing legal test. Both purportedly conflicting decisions applied the same well-settled test set forth in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). The different results did not stem from disagreement over the federal constitutional test; the courts resolved different factual circumstances relating to different pipelines. In any event, the District seeks only to correct what it perceives as a misapplication of *Complete Auto* to a specific set of facts, which is not a proper basis for certiorari. *See* Sup. Ct. R. 10 ("certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law").

Third, this Court's review is premature at best because there are independent state law grounds that remain unresolved in Texas. These include the arguments that respondent ("Peoples") lacks any taxable property interest in the gas at issue and that the gas cannot be taxed under Texas law because it is only "temporarily" in the state. The court of appeals did not reach the latter argument in this case, but another Texas court has disallowed a similar tax on that state law ground. If the Texas Supreme Court resolves any of the state law issues against a taxing authority in a future case, that would obviate the constitutional issue in Texas.

Fourth, the court below correctly applied the flexible *Complete Auto* test to "the particular, unique circumstances at hand and the complex relationships among the parties involved." Pet. App. 21. Those unique circumstances include that Peoples has no contacts with Harrison County, no control over the disposition or physical storage of any gas before delivery in Chicago, and no risk of loss should anything happen to any gas in Harrison County. Accordingly, Peoples lacks the requisite nexus with the taxing authority and receives no benefits from taxes paid.

Finally, the case raises no broader issues about the validity of other taxes on other kinds of property. Unlike other circumstances where a party owns taxable property situated in a locality, Peoples lacks any incidents of full title ownership to gas in Harrison County and was simply deemed the technical owner for tax purposes by default. The court of appeals correctly held that these tenuous relationships with the taxing authority were insufficient to permit the tax under *Complete Auto*, and this application of settled law to a narrow factual setting does not warrant this Court's review.

It is not surprising that a Texas locality would try to tax a Chicago business engaged in interstate commerce that has no way to avoid the tax and no legislative recourse. But that is exactly the kind of burden on commerce the Constitution precludes localities from imposing. The petition should be denied.

COUNTERSTATEMENT

A. The Pipeline System.

Peoples is a public utility providing natural gas to over a hundred thousand residential and other

customers in Chicago. 2 Reporter's Record ("RR") 63. It contracts with Natural Gas Pipeline Company of America ("Pipeline") to transport the gas to Chicago. Pet. App. 2.

Pipeline is a common carrier that transports gas on its system pursuant to rates, terms, and conditions regulated by the Federal Energy Regulatory Commission ("FERC"). *Id.* Its pipelines form a tilted "A" on a U.S. map, with two legs that start in Texas and New Mexico, meeting at their northernmost ends (near Chicago), and a connector that crosses through Oklahoma and Texas to join the legs farther up the line. 2 RR 66-67; PX12. Supplies can be injected into the system at various points, which predominantly exist at the southern end. 4 RR 15-16.

Pipeline could not conduct its interstate gas transportation system without storage facilities along the pipelines. 2 RR 42, 147; 3 RR 13. "'Underground gas storage facilities are a necessary and integral part of the operation of piping gas from the area of production to the area of consumption.'" *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 295 n.1 (1988) (citation omitted). *See also* 18 C.F.R. § 284.1(a) ("Transportation includes storage, exchange, backhaul, displacement, or other methods of transportation."). Thus, Pipeline must operate the storage facilities both for delivery and operational purposes. 2 RR 30; 3 RR 91, 148-49.

Pipeline has at least eight storage facilities. 2 RR 72. One is in Harrison County, Texas—known as the North Lansing facility—another is in Oklahoma, and six are in the Iowa-Illinois zone. *Id.* FERC determined that the North Lansing facility serves interstate commerce and has asserted jurisdiction over it.

101 F.E.R.C. ¶ 61,361 (Dec. 24, 2002). For its system to work properly, Pipeline must maintain large volumes of "cushion" gas in North Lansing. Pet. App. 2. Pipeline pays substantial ad valorem taxes on this cushion gas as well as its extensive facilities in Harrison County. *Id.* at 22.

This case arises because the District seeks to tax the value of "working" gas, which is part of the interstate shipments of Pipeline's customers. Working gas is injected into and withdrawn from the North Lansing facility for delivery almost daily. 2 RR 148. There is no longer any dispute that this gas is in interstate commerce, as the District has abandoned any claim to the contrary. *See infra* at 11.

B. The Natural Gas Market.

The gas market operates independently from physical transportation systems. Pet. App. 6. A pipeline company's customers do not own particular molecules of gas, or any physical block of gas anywhere on the system. 3 RR 14, 87-99, 95. And Pipeline does not identify particular volumes as belonging to an individual customer. 2 RR 150-51. Indeed, the framework established by FERC separates customer ownership and a pipeline's physical operation—sellers and purchasers may buy and sell at commercial, not physical, points on the pipeline system. 2 RR 34; 3 RR 14, 87-88.

Accordingly, sellers and buyers of gas enter into transactions at commercially-designated points on the system known as paper pooling points. Pet. App. 6. There is no gas physically located at the pooling points. But at the pooling points, customers can trade gas rights, contractually transport gas to the pool, or sell gas to another party. 2 RR 34-35. It is

this latter scenario that applies to Peoples—it delivered no gas into Pipeline's system; instead, all of its natural gas was purchased from other parties at these paper pooling points. 2 RR 88.

Once gas enters Pipeline's system, customers have no control over where in the system the physical gas goes. Rather, "Pipeline decides where and when the natural gas is stored." Pet. App. 7. But customers like Peoples pay to have their gas contractually stored in particular geographic areas. Although Pipeline's contracts with customers do not refer to particular storage fields, they designate storage in specified geographical zones identifying the distance gas is transported for pricing purposes. 2 RR 74, 89-90, 169; PX12. The transportation price is determined by the number of zones between where the gas entered the Pipeline system and where it was delivered. 2 RR 74; PX12. For example, if a producer delivers gas in the South Texas zone and wants to transport the gas to the "TEX-OK" zone, it will be charged more than if it chooses a pooling point in the South Texas zone. 2 RR 74; PX12. However, a customer can only take physical delivery of its gas in the same zone that houses the pooling point for the gas. 2 RR 78-79.

This system compensates for the physical reality that a customer cannot quickly take delivery in Chicago of gas molecules injected into the system elsewhere. 3 RR 94-95; 4 RR 70. While gas may move from South Texas to Chicago the same day for contract purposes—and Pipeline is paid accordingly—the actual molecules of gas could not make it to Chicago in that time, and could ultimately be delivered to any point in the system. 3 RR 94-95.

Thus, even though a customer's supplier might deliver gas produced in Texas into one leg, the customer might receive gas produced in the Gulf of Mexico that was injected by a different supplier into the other leg. 4 RR 73. All that matters is that the gas is delivered in the specified zone. And in light of higher winter demand, Pipeline uses storage to provide greater quantities of gas during that time without having to build other infrastructure. 2 RR 73, 147. Additionally, customers like Peoples purchase gas during the off-season and contractually store that gas on Pipeline's system during the transportation process. 2 RR 105-07.

Peoples' invoices for gas storage evidence that its gas was all stored in the Iowa-Illinois zone. 2 RR 84-88; PX15; PX16; PX17. That is consistent with Peoples' contractual rights, which were limited to storing gas in the Iowa-Illinois zone. 2 RR 89-90. Designating storage in Iowa-Illinois had a significant business advantage for Peoples because it would have cost more if the gas had to cross pricing zones during the more expensive winter months. 2 RR 89.

Peoples is not entitled to any gas located at North Lansing. "[I]t cannot specifically request gas from that facility and could not merely back a truck up to the facility and remove any amount of natural gas." Pet. App. 8. Peoples also has no commercial incidents of ownership over any gas in North Lansing. There is no transaction confirmation or invoice reflecting that Peoples held title to gas located there. Peoples has no legal rights to any gas in North Lansing, faces no risk of loss if anything should happen to the gas there, and has no right to any accretions in the value of the gas in the facility. 2 RR 92; PX21 at 5-6. Indeed, Pipeline must hold

Peoples, and all shippers, harmless for any damage or injuries caused by gas in its system. DX23 at 144. Although Peoples cannot access any gas it purportedly owns in Harrison County, 2 RR 92, it has the right to obtain gas at one of its Chicago-area delivery points in the Iowa-Illinois zone. 2 RR 82, 88.

Peoples' business is providing gas to the people of Chicago. How Pipeline delivers the gas does not concern Peoples and is outside Peoples' control. On the other hand, Pipeline has a significant connection to Harrison County. It owns extensive facilities and 70 billion cubic feet of cushion gas there. 2 RR 169. As a result, Pipeline pays substantial ad valorem taxes to Harrison County on both its facilities and the cushion gas, which Harrison County may use to offset whatever costs it may incur from Pipeline's decision to locate its operations there. Pet. App. 22.

C. The Proceedings Below.

In 1999 and 2000, the District attempted to tax Peoples by allocating it a portion of the working gas balance as of December 31. Peoples challenged the assessments and, on its appraisal consultant firm's advice, the District removed Peoples from the tax rolls. *Id.* at 2-3. The District then changed consultants, and once again attempted to assess taxes against Peoples for tax years 2003 to 2005. *Id.* at 3. This time it refused to remove Peoples from the rolls.

The District allocated gas by first limiting the potential taxpayers to shippers who (1) contracted for transportation on the Gulf Coast Line and (2) had a contract that included a particular form of storage—an NSS contract. *Id.* at 3-4. The District ignored whether contracts included storage in the TEX-OK zone, where Harrison County sits, thereby

including Peoples even though its contracts included storage only in the Iowa-Illinois zone. *Id.* It then determined each remaining shipper's proportion of Pipeline's total NSS contracts for the Gulf Coast Line and multiplied that proportion by the total working gas at North Lansing on December 31 of the preceding year. *Id.*

Peoples protested the assessments, and after a bench trial, the court ruled in the District's favor. In the Texas Court of Appeals, Peoples presented three state law grounds for reversal. First, Peoples argued that it did not own the taxed gas. Br. of Appellant 18-24, No. 06-07-00103 (Tex. Ct. App. filed Dec. 3, 2007). Second, it argued that the District misallocated ownership. *Id.* at 24-26. And third, Peoples argued that the tax was improper under Texas law because the gas only stayed in North Lansing temporarily. *Id.* at 35-37. Peoples also argued that the tax would be invalid under the dormant Commerce Clause. *Id.* at 37-41.

D. The Decision Below.

The Court of Appeals reversed. It noted that while only the property's owner may be taxed under Texas law, "[i]f an individual or entity does not hold perfect legal title * * * that individual or entity may still be considered the taxable owner of the property." Pet. App. 5. The court explained that "[t]he term 'owner' has no fixed legal meaning" and that "'[t]he meaning of the term owner is not the same under all circumstances.'" *Id.* at 6 (citation omitted).

The court then noted facts indicating that Peoples did *not* have perfect legal title, including Pipeline's "full custody, control, and possession of the natural gas," Peoples' lack of any "legal right to the natural

gas located at North Lansing," that Peoples "owns merely contractual rights to physically receive natural gas in Chicago," and Peoples' contracts that "call for contractual storage in the Iowa-Illinois zone." *Id.* at 8. Nevertheless, the court held, by default, that "Peoples is the owner *for ad valorem taxation purposes*," *id.* at 7 (emphasis added), because "there must be an owner of that gas for tax purposes" and, by regulation, it could not be Pipeline. *Id.* at 8.

Next, the court determined that the gas remained in interstate commerce throughout its journey. The court held that the gas became part of interstate commerce when it was placed with Pipeline, a common carrier. *Id.* at 11. And temporarily storing the gas did not remove it from interstate commerce. *Id.* at 12-17.

But this determination only began the Commerce Clause inquiry. The court then applied the settled, multi-factor *Complete Auto* test to determine whether the District could tax the gas even though it was in interstate commerce. Without addressing the remainder of the test, the court invalidated the tax because it failed the first and fourth *Complete Auto* prongs, which require a tax on interstate commerce to be "applied to an activity with a substantial nexus with the taxing state," and "fairly related to the services provided by the State." 430 U.S. at 279.

The court first noted that because Peoples had no physical presence in Harrison County, a nexus could not be established that way. Pet. App. 19. Then, it "look[ed] strictly at the generic act of storing gas in a reservoir in Harrison County." *Id.* The court ruled that storage could not establish a substantial nexus because "Pipeline—not Peoples—directs that activ-

ity," and Peoples' "only connection in this respect to Texas is through the structure and location of Pipeline's pipeline and Pipeline's decision to store a significant amount of natural gas in North Lansing." *Id.* at 20. It found an insufficient nexus due to the "particular, unique circumstances at hand and the complex relationships among the parties involved." *Id.* at 21.

The court ruled, additionally, that the tax failed *Complete Auto*'s fourth prong because services the District purportedly provides, such as police and fire protection, all inure to Pipeline's benefit, not Peoples'. *Id.* at 21-22. It did not rule on Peoples' state law claims that the gas could not be taxed because it was only in the state temporarily or was improperly allocated.

The District petitioned the Texas Supreme Court for review, but abandoned any contention that the gas was not in interstate commerce. In its merits brief to that court, the District stated that it "does not ask this Court to decide the interstate-commerce issue" and that it had "abandon[ed] [this] 'unbriefed' issue." Pet. Brief on the Merits 13, 14, No. 09-0053 (Tex. filed July 6, 2009). *See* Pet. 8 (noting that the taxed gas is "in interstate commerce"). The Texas Supreme Court denied review, Pet. App. 48, and denied a petition for rehearing, *id.* at 49. The District now petitions this Court for a writ of certiorari to review the decision of the Texas Court of Appeals, Sixth Appellate District.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT AMONG ANY FEDERAL CIRCUIT COURTS OR STATE COURTS OF LAST RESORT.

The District does not argue that there is a conflict among any state courts of last resort or federal circuit courts that would warrant certiorari under Sup. Ct. R. 10(b). Nor does it allege a conflict between the decision below and any binding precedent of this Court on the question presented. Rather, it identifies a single state supreme court decision that it contends conflicts with the decision of a Texas intermediate appellate court. That lone opinion does not bring this complex issue to a maturity level that warrants this Court's intervention.

Throughout the petition, the District relies heavily on then-Solicitor General Kagan's brief in *Missouri Gas*. But when the Solicitor General recommended denying certiorari—after the opinion below had already issued in this case—she noted that the Oklahoma Supreme Court was "the first and only state court of last resort to have decided whether a State may levy an ad valorem tax on natural gas stored in the State pending transport via an interstate pipeline." Br. for the U.S., *Missouri Gas Energy* v. *Schmidt* ("Invitation Br."), No. 08-1458, at 7 (filed Jan. 26, 2010). For that reason, she stated that the "purported conflicts" between the Supreme Court of Oklahoma and the Texas intermediate appellate courts did not "warrant this Court's review." *Id.*

Nothing has changed. That the District was unable to convince the Texas Supreme Court to take its case is hardly a compelling reason for this Court

to do otherwise. This Court rarely reviews intermediate state appellate court decisions, and no cause exists for such unusual intervention here. As the Court has noted in dismissing a writ of certiorari to an intermediate state court, "[t]he best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity." *Parker* v. *Los Angeles Cty.*, 338 U.S. 327, 333 (1949).

There is no such necessity here. As a court of final review, this Court generally allows issues to mature in the lower courts before issuing a nationally binding rule, so that it can benefit from the views of many courts applying the law to various factual scenarios. "[I]t is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court." *McCray* v. *New York*, 461 U.S. 961, 963 (1983) (Stevens, J., concurring in denial of certiorari).

An extraordinary departure from that practice is unwarranted here, where only a single state supreme court has even arguably addressed the issue and review is sought of an intermediate state court decision. As explained below, the courts agree on the governing constitutional test, and the federal question may not even exist in Texas because the Texas Supreme Court may resolve the issue in taxpayers' favor on state law grounds in the future. The District calls the issue "recurring." Pet. 10. If so, this Court can address it if and when a mature conflict develops. If not, there is no reason for this Court to intervene at all.

Just as when the Court denied certiorari in *Missouri Gas*, there remains "no pressing need for this Court's intervention now." Invitation Br. 7. The District cites no exigencies demanding this Court's immediate review without awaiting further opinions from other state courts of last resort or the Texas Supreme Court. Despite its plea of urgency, before 2003 the District itself voluntarily rescinded its tax without judicial invalidation, and it retains the ability to tax the pipeline, its extensive facilities, and cushion gas in the county. Natural gas has been stored underground in this country for nearly a century. Arthur J. Kidnay & William R. Parrish, *Fundamentals of Natural Gas Processing* 256 (2006). Yet the District cites only one case that has ever approved a tax on an interstate shipper's stored gas, and only two appellate cases where the constitutional issue was even considered. There is no more reason for this Court to intervene now than when the Court denied certiorari in *Missouri Gas*.

II. THERE IS NO DISPUTE OVER THE PROPER LEGAL STANDARDS.

No conflict exists between the Texas Court of Appeals and the Oklahoma Supreme Court over the correct legal standards. Both courts applied the same standard mandated by this Court: the *Complete Auto* test. *Compare* Pet. App. 18 *with Missouri Gas*, 234 P.3d at 952-59. At best from its perspective, the District complains about "the misapplication of a properly stated rule of law," which is not a proper basis for certiorari. Sup. Ct. R. 10. *See* DCAD Amicus Br. 10 (arguing that "the Court of Appeals simply applied the *Complete Auto* test to the facts at hand incorrectly").

1. Because it cannot dispute that the two courts applied the same legal test, the District attempts to manufacture a controversy over whether and to what extent a "continuity of transit" or "physical presence" analysis supersedes the *Complete Auto* test in cases like this. Pet. 14-20. No such controversy exists.

With regard to the "continuity of transit" analysis, the Solicitor General correctly explained that the court below did not apply that analysis in lieu of--or even as part of—the *Complete Auto* test. She stated that "various state courts"—specifically including the Texas Court of Appeals in this case—"have applied the *Complete Auto* factors, *rather than the 'continuity of transit' test*, in adjudicating dormant Commerce Clause challenges to local taxation." Invitation Brief 11 (citing opinion below; emphasis added).

The court below referred to the "continuity of transit test" only as a hurdle for *Peoples* to overcome *before* the *Complete Auto* test could be applied. Pet. App. 16-17. It used the test to determine whether the gas remained in interstate commerce, as a pre-requisite for applying *Complete Auto*. *Id.* If no continuity of transit had been shown, the tax would have been upheld on that ground.

Contrary to the District's claim that the analysis colored all the court's subsequent analysis, Pet. 16, the court never addressed the continuity-of-transit test again. Instead, it independently applied the *Complete Auto* test to determine whether the tax was valid even though it was in interstate commerce. Pet. App. 18-21. To the extent the Oklahoma Supreme Court believed the Texas Court of Appeals applied the continuity-of-transit analysis in lieu of *Complete Auto*, *see Missouri Gas*, 234 P.3d at 959

n.84, the court misread the opinion in this case. Accordingly, the purported "direct conflict" between the courts on this point, Pet. 16, is a false one.

Indeed, by independently applying the *Complete Auto* test without considering the continuity-of-transit factors under that test, the court below employed an analysis that was more favorable to the *District* than it had to be. As the Solicitor General noted, "[i]n cases like this one, the same factors that the Court previously considered to determine continuity of transit may inform the first prong of the *Complete Auto* inquiry." Invitation Brief 12. Thus, while it would have been appropriate for the court to employ the continuity-of-transit factors under the *Complete Auto* test—which would have weighed against the District—it did not.

Nor is there any conflict over the "physical presence" test. Applying the first prong of *Complete Auto*—whether a substantial nexus exists—the court below first noted that "[t]he Commerce Clause requirement of a substantial nexus with the taxing state is satisfied by the taxpayer's physical presence in the state." Pet. App. 19. Unsurprisingly given the lack of contacts between Peoples and Harrison County, the court found no such presence. But the court did not suggest that physical presence was the *only* way to establish a substantial nexus. It merely concluded that Peoples' lack of a physical presence meant that some other nexus must exist.

Contrary to the District's suggestions, Pet. 18-20, the court did not stop there. It then analyzed the nexus issue "look[ing] strictly at the generic act of storing gas in a reservoir in Harrison County," Pet. App. 19—exactly what the District advocates here,

Pet. 25-26. The court also analyzed whether a nexus could be established based on a claim that the gas comes from Texas. Pet. App. 20. Finding that no proffered rationale established a substantial nexus, the court held that the tax failed *Complete Auto*'s first prong. As with the continuity-of-transit analysis, the court's finding of no physical presence neither supplanted nor dictated the outcome of the *Complete Auto* test.

2. The different result in *Missouri Gas* did not stem from disagreement over the applicable legal test but rather from applying that test to similar, but nonetheless distinct, facts.

For example, in finding a substantial nexus, the Oklahoma court held that the shipper could not argue that it did not intend for storage to occur in Oklahoma on the facts of that case. *Missouri Gas*, 234 P.3d at 955 ("If gas is stored [in Woods County], and it is, MGE cannot claim it does not intend for that to happen."). Indeed, the taxpayer offered no evidence that it did not own the taxed gas. *Id.* at 951. Moreover, the Oklahoma court (and the Solicitor General) found it significant that FERC had approved a tariff establishing an apportionment formula for gas stored in the facility, which helped prevent any undue burden on interstate commerce. *See id*; Invitation Br. 3, 6-7, 17, 18, 20. The court also noted that all of the gas at issue "originates within the state of Oklahoma." *Missouri Gas*, 234 P.3d at 949. And based on the facts of that case and Oklahoma law, the court held that the shipper had "unified title"—both legal and beneficial—to a share of the gas stored in Oklahoma. *Id.* at 948.

Here, by contrast, there can be no claim that Peoples affirmatively intended for storage to occur in Harrison County. To the contrary, the only indicia of Peoples' intent are contracts that expressly call for storage in the Iowa-Illinois zone, and invoices confirming that contractual storage. 2 RR 84-88, 89-90; PX15; PX16; PX17. Unlike in *Missouri Gas*, there is no FERC-approved allocation here evidencing shippers' understanding that their gas would be allocated to a Texas situs. Likewise, although the record "suggests" that much of the gas at North Lansing was Texas-produced, the origination of gas that Peoples purchased off of Pipeline's system can never be known. Pet. App. 21. And the Texas court, applying Texas law, did not hold that Peoples had full, unified legal title to any gas in Harrison County. Rather, it held only that Peoples was the owner, by default, "for ad valorem taxation purposes," *id.* at 7, based solely on its conclusion that Pipeline could not be the owner, *id.* at 8-9. In contrast to the Oklahoma court's holding under that state's law that shippers have full, unified title to gas stored in Oklahoma, under Texas law Peoples "has no legal right to the natural gas located at North Lansing." *Id.* at 8.

Moreover, the Oklahoma Court held that the gas at issue in that case was "not in transit in such a way as to invoke the protection of the Commerce Clause." *Missouri Gas*, 234 P.3d at 955. Although the Texas Court of Appeals reached a different conclusion on this threshold issue on the facts of this case, the District expressly abandoned that argument in the Texas Supreme Court and does not present it in its petition to this Court. *See supra* at 11. Accordingly,

any conceivable conflict between the courts on this threshold issue is not before this Court.

Furthermore, the Oklahoma court reviewed circumstances under which the shipper had purchased natural gas from suppliers and contracted with the pipeline for transportation of that gas once the gas was placed on the system. *Missouri Gas*, 234 P.3d at 943, 944. By contrast, all gas purchased by Peoples was already in transport on Pipeline's system and purchased at paper pooling points. 2 RR 88.

In the end, the Texas court found no substantial nexus given "the particular, unique circumstances at hand and the complex relationships among the parties involved." Pet. App. 21. The Oklahoma court quoted this language in reaching a different result on the facts before it. *Missouri Gas*, 234 P.3d at 959 n.84. Although that court disagreed with what it thought was the reasoning of the court below, *id.*, much of that disagreement stemmed from misreading the opinion. As noted above, *supra* at 15-16, the Texas Court of Appeals did not employ the continuity-of-transit analysis to determine that the tax failed the *Complete Auto* test.

III. THERE ARE DISPOSITIVE, INDEPENDENT, UNRESOLVED STATE LAW GROUNDS.

Review is also premature because significant, independent state law grounds remain unresolved in Texas that could—and likely would if later considered by the Texas Supreme Court—render advisory any decision by this Court on the constitutional question. *Cf. Parker*, 338 U.S. at 332 (where California Supreme Court denied review, certiorari to intermediate state court was inappropriate because "[f]or all we know the California courts may

sustain these claims under local law"). Nor should the Court consider the constitutional issue without a definitive ruling on the state law questions that underlie proper consideration of the nexus issue.

1. Under Texas law, personal property tax may only be assessed against property located in the taxing unit for more than "a temporary period." Tex. Tax Code § 11.01(c)(1). The statute does not define "temporary," which is left to judicial construction on the facts of each case. *Patterson-UTI Drilling Co.* v. *Webb Cty. Appraisal Dist.*, 182 S.W.3d 14, 18 (Tex. App. 2005). Property is in a jurisdiction only "temporarily" if it is not there with a "degree of permanency." *Greyhound Lines, Inc.* v. *Bd. of Equalization*, 419 S.W.2d 345, 349 (Tex. 1967).

Under Texas law, personal property is in the state only temporarily if it is in interstate commerce. *See Dallas Cty. Appraisal Dist.* v. *L.D. Brinkman & Co.*, 701 S.W.2d 20, 23 (Tex. App. 1985). Such property is not taxable under state law, *id.*, regardless of whether the Commerce Clause would also prohibit the tax. There is no longer any dispute that the gas at issue remains in interstate commerce. The Texas Court of Appeals so held, Pet. App. 17, and the District abandoned any appeal of that conclusion in the Texas Supreme Court, *supra* at 11. The argument has therefore been waived both in this Court and in Texas. *See Parker* v. *Illinois*, 333 U.S. 571 (1948); *Guitar Holding* v. *Hudspeth Cty. Underground Water Conservation Dist. No. 1*, 263 S.W.3d 910, 918 (Tex. 2008) ("issues not presented in the petition for review and brief on the merits are waived").

Peoples expressly argued, both to the Court of Appeals and to the Texas Supreme Court in a

conditional cross-petition for review, that the gas could not be taxed under Texas law because it was only temporarily in Harrison County. *See* Br. of Appellant 35-37, No. 06-07-00103 (Tex. Ct. App. filed Dec. 3, 2007); Resp. Br. on the Merits 53-55, No. 09-0053 (Tex. filed Aug. 10, 2009). The Court of Appeals did not reach this argument, and the Texas Supreme Court had no occasion to do so because it denied review.[1] But based on the precedents cited above, it is likely the Texas Supreme Court would hold that Texas state law prohibits taxation of gas stored while being shipped in interstate commerce.

Indeed, one Texas court has already so held in a similar case. In *Midland Cent. Appraisal Dist.* v. *BP Am. Production Co.*, 282 S.W.3d 215, 225 (Tex. App. 2009), a case that the District claims raises similar issues to this case, Pet. 17-18, the Court ruled as an alternative, independent state ground that the appraisal district could not assess personal property taxes on oil in a tank farm because the oil was only in Texas temporarily.

Because a determination that the gas is in interstate commerce precedes any consideration of the Commerce Clause defense, such a state-law holding by the Texas Supreme Court would obviate the federal issue. Accordingly, this Court should not render what would likely become an advisory opinion on a constitutional issue where the Texas Supreme Court has not yet ruled on whether Texas law even permits this kind of tax.

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[1] In the unlikely event this Court grants certiorari and reverses on the federal issue, Peoples could, on remand, re-petition the Texas Supreme Court on this and other state law defenses.

2. Peoples also argued below that it could not be taxed on any gas in Harrison County because it was not the owner of that gas under Texas law. Although the Texas Court of Appeals rejected that argument, Peoples reasserted that state-law defense in its conditional cross-petition to the Texas Supreme Court. *See* Resp. Br. on the Merits 16-22, No. 09-0053 (Tex. filed Aug. 10, 2009). Because it denied review, that court did not decide the issue.

The extent of Peoples' ownership interest, if any, in the taxed gas undergirds the judgment the District asks this Court to review because the purported nexus between the county and the taxpayer depends in part on the nature of that interest. Yet there is no definitive ruling on that issue by the final arbiter of Texas law. As with the "temporary period" question, if the Texas Supreme Court later rules on this issue in a taxpayer's favor, that would eliminate any need to consider the federal question. Moreover, a definitive understanding of the property interest (if any) is crucial to any intelligent analysis of the Commerce Clause nexus, particularly given the District's contention that an alleged property right is dispositive of the question. This Court should not prematurely review the federal question where the Texas Supreme Court has not yet spoken on that important state-law issue. *See Tyler Pipe Indus., Inc.* v. *Wash. State Dept. of Rev.*, 483 U.S. 232, 252 (1987) (declining to consider Commerce Clause refund issues where "'the federal constitutional issues involved may well be intertwined with, or their consideration obviated by, issues of state law'") (citation omitted).

3. Peoples also argued below that the District's allocation violated Texas state law, and that under a

proper allocation Peoples should not have been allocated any gas in Harrison County. *See* Br. of Appellant 24-26, No. 06-07-00103 (Tex. Ct. App. filed Dec. 3, 2007). To allocate the gas for tax purposes, the District excluded shippers based on what kind of storage they contracted for and which leg of the pipeline their contracts specified, Pet. App. 3-4, even though the pipeline works in the aggregate and thus gas physically stored in Harrison County is delivered to both excluded classes, 2 RR 32-33, 46. This artificially increased the amount of gas allocated to shippers like Peoples. Had the District applied a consistent and proper allocation, it could not have allocated any ownership to Peoples, which contracted for storage in a different zone.

The Court of Appeals did not specifically address this issue and neither, of course, has the Texas Supreme Court. In considering the federal constitutional issue, it is plainly important to know whether any gas is properly allocated to Peoples under state law and, if so, how much. As with the other state-law issues, this Court should not prematurely review that constitutional issue where the allocation question remains unresolved under Texas law.

IV. THE DECISION BELOW IS CORRECT.

Although certiorari is unwarranted in any event, the court below did not err in applying the flexible, four-factor *Complete Auto* test to "the particular, unique circumstances at hand." Pet. App. 21.[2]

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[2] Nor did Solicitor General Kagan opine otherwise in her advocacy role in *Missouri Gas*. She merely stated that the Oklahoma court reached the correct result in that case "based on the record below" and "[b]ased on the current record." Invitation Br. 6, 13. When referring to the decision in this case, she noted

1. The Texas Court of Appeals did not err in holding that the District failed to meet the first prong of the *Complete Auto* test. It is now conceded that the gas at issue is in interstate commerce. *See supra* at 11. Thus, to be valid, the District's tax must be "applied to an activity with a substantial nexus with the taxing state." *Complete Auto*, 430 U.S. at 279. Harrison County is trying to tax *the shipper*—Peoples—not the gas, which is an inanimate substance incapable of receiving or paying a tax bill. Thus, there must at least be a definite link between the shipper and the property to be taxed as well as between the property and the county. As the Court of Appeals correctly found, no such substantial nexus exists here because Peoples lacks any significant ties to any gas in Harrison County. It only has a contractual right to take gas in interstate commerce that was stored in the Iowa-Illinois zone.

The court below found that Peoples, by default, had a technical ownership interest in gas in Harrison County for tax purposes. Pet App. 7. But it recognized that this technical interest did not amount to a property right or full title ownership. *Id.* at 8. Peoples does not have full legal title under Texas law in light of (1) Pipeline's "full custody, control, and possession of the natural gas," (2) Peoples' lack of any "legal right to the natural gas located at North Lansing," (3) the fact that Peoples "owns merely contractual rights to physically receive natural gas in Chicago," and (4) the fact that Peoples' contracts "call for contractual storage in the Iowa-Illinois

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only a "purported conflict[ ]" and indicated that the Texas Court of Appeals had applied the *correct* legal test. *Id.* at 7, 11.

zone." *Id.* And without such legal title, there is no way to establish a nexus between the taxed entity and Harrison County merely through the location of the taxed property. *Id.* at 19-21.

Nor can a nexus with Harrison County be established through any actions undertaken by Peoples. Because Peoples has no physical presence there—or anywhere in Texas—in the form of offices, employees, representatives or facilities, a nexus cannot be established that way. *Id.* at 19. Pipeline, not Peoples, controls the gas before delivery in Chicago, and Pipeline alone bears the risk of loss should anything happen to gas in Harrison County. *Id.* at 8. Peoples does not intend to store, use or sell gas within Texas. Indeed, Peoples cannot even access any gas in Harrison County and its contracts specify storage elsewhere. Nor does storage in Harrison County serve any business purpose of Peoples. Indeed, its business would be impeded by storing gas there because it would make delivery during the winter months more expensive, which is why it contracts for storage in the Iowa-Illinois zone. 2 RR 89. Unlike in *Missouri Gas*, there is no evidence that all gas attributed to Peoples originated in Texas. Pet. App. 21. And the State has already addressed beneficial use of gas originating in Texas through its severance tax and tax on gas reserves. Tex. Tax Code §§ 201.051, 23.175.

The District concedes that "volumes of Peoples' gas may come and volumes of gas may go," because it is subject to near-constant movement. Pet. 26. Thus, the District seeks to establish a substantial nexus based on a fictional allocation of gas moving in interstate commerce on a particular day according to variables in existence on that day alone, where the

technical owner has no ability to avoid the tax by specifying storage elsewhere, no rights to the property, and no legislative representation in the taxing jurisdiction. Given these "particular, unique circumstances at hand and the complex relationships among the parties involved," Pet. App. 21, the court below did not err in finding no substantial nexus.

Moreover, although the Court of Appeals did not employ a continuity-of-transit analysis in applying the *Complete Auto* test, that analysis, as the Solicitor General has noted, can be used to "inform the first prong of the *Complete Auto* inquiry." Invitation Br. 12. If a product is merely passing through a state in interstate commerce to be sold in another state, any link to the state it transits is minimal and any tax on it is unlikely to survive scrutiny under *Complete Auto*. Thus, if those factors are added to the equation in this case, the invalidity of the tax becomes even clearer. *See* Pet. App. 12-17 (applying continuity-of-transit analysis to determine that the gas remains in interstate commerce). Indeed, the District has abandoned any argument that the gas in question does not remain in interstate commerce, resting instead on its position that the continuity-of-transit analysis is wholly irrelevant.

The District essentially advocates for elimination of the nexus requirement for all *ad valorem* property taxes. It finds it irrelevant whether property is only temporarily in a jurisdiction as part of an interstate journey or whether the technical owner has any presence in the jurisdiction or right to control whether the property is even there. Instead, it contends that the location of property moving in interstate commerce on a particular "tax day" alone justifies the tax. *See* Pet. 26. If so, there is no rea-

son why a locality could not tax the value of anything in interstate commerce that happens to be in the jurisdiction on tax day, be it gas moving through a pipeline or FedEx packages in an overnight sorting facility. Although the District disclaims that result, *id.* at 27, nothing in its simplistic location-of-the-property test would limit such taxes.

2. Nor did the Court of Appeals err in holding that the tax independently fails *Complete Auto*'s fourth prong because Peoples receives no benefits from Harrison County. The fourth prong is related to the first, but "imposes the additional limitation that the *measure* of the tax must be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a 'just share of the state tax burden.'" *Commonwealth Edison Co.* v. *Montana*, 452 U.S. 609, 626 (1981) (citation omitted; emphasis in original). "When a tax is assessed in proportion to a taxpayer's activities or presence in a State, the taxpayer is shouldering its fair share of supporting the State's provision of 'police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.'" *Id.* at 627 (citation omitted).

Peoples has no "activities or presence" in Harrison County. It has no physical presence, and the only purported link it has is the taxed gas. But Peoples is only the nominal, default owner "for tax purposes." Pet. App. 8. It does not choose to store gas in Harrison County or invoke any of its protections. *Id.* at 20. And most importantly, Peoples bears no risk of loss from anything that happens to the gas in Harrison County.

The only service the District raises as beneficial to Peoples is "the need for fire protection." Pet. 29. But because Peoples has no risk of loss, it does not benefit from fire protection—Pipeline does. Nor does Peoples benefit from police protection, a trained work force in Harrison County, or any other government activity. All benefits of a civilized society provided by Harrison County inure to the benefit of Pipeline. Pet. App. 21-22 ("services such as law enforcement and the fire department would serve the North Lansing facility itself, and the facility undoubtedly belongs to Pipeline"). And that is why Pipeline legitimately is required to pay taxes on its facility and on the cushion gas. *Id.*

The District claims that Pipeline's role and taxes paid are irrelevant because "Peoples' working gas" should be taxed. Pet. 28 (emphasis omitted). But even assuming that Peoples has working gas in Harrison County, the fact that it bears no risk of loss means that it gains no benefit from whatever protection Harrison County provides.

3. Although the Court of Appeals did not need to address *Complete Auto*'s second prong, the District's tax fails that requirement as well. Indeed, the lack of any opinion below on that issue is yet another reason why this Court's review would be premature.

Complete Auto's second prong requires a tax to be fairly apportioned. To be fairly apportioned, a state's tax on goods in interstate commerce must be both "internally and externally consistent." *Goldberg* v. *Sweet*, 488 U.S. 252, 261 (1989). A tax is externally consistent if "the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the

activity being taxed." *Id.* at 262. "[T]he threat of real multiple taxation (though not by literally identical statutes) may indicate a State's impermissible overreaching." *Okla. Tax. Comm'n* v. *Jefferson Lines*, 514 U.S. 175, 185 (1995).

The District has created a clear threat of multiple taxation; indeed, Peoples could be taxed on the same gas several times over. Unlike the taxing authority in *Missouri Gas*, the District did not follow a FERC-approved allocation, but rather allocated gas in Harrison County to all customers with NSS contracts on the Gulf Coast line, excluding those shipping on the other line and those with other types of storage contracts. But because nobody can ever know where a shipper's gas molecules are actually located, another taxing authority might allocate tax liability among all shippers who "own" gas on the entire system as a whole, including a share already taxed by Harrison County. If a jurisdiction on Pipeline's other line adopted that formula, Peoples would be taxed on gas purportedly stored both in Texas and the other state simultaneously. Moreover, if a jurisdiction in the Iowa-Illinois zone chose to allocate ownership based on where the parties actually agreed to store the shipper's gas, Peoples would be taxed *again* on the same gas because *all* of its gas is stored contractually in the Iowa-Illinois zone. And if different jurisdictions use different "tax days," shippers like Peoples could pay multiple taxes on the same gas as storage allocations continually change on ensuing days.

Thus, the District's tax fails *Complete Auto*'s second prong because there is a threat that Peoples will be taxed multiple times on the same gas. *Cf. Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 170

(1954). Nor is it relevant that this harm has not yet come to pass, because the threat of multiple taxation itself suffices to invalidate the tax. *See Tyler Pipe Indus., Inc.* v. *Wash. State Dep't of Revenue*, 483 U.S. 232, 242 (1987) (unconstitutionality of tax "cannot be alleviated by examining the effect of legislation enacted by its sister States"); *Armco, Inc.* v. *Hardesty*, 467 U.S. 638, 645 (1984) (invalidity does not "depend on the shifting complexities of the tax codes of 49 other states").

4. The Commerce Clause arose from the Framers' "conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes* v. *Oklahoma*, 441 U.S. 322, 325 (1979). It prevents "state taxes and regulatory measures [from] impeding free private trade in the national marketplace." *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 437 (1980).

The tax at issue threatens just this kind of harm to commerce. If every locality may tax the value of a commodity that is concededly in interstate commerce and over which the technical owner has no control, the burdens on commerce would multiply with every locality the commodity crosses. Out-of-state entities like Peoples, which have no connection with the taxing authority and no ability to avoid the tax, would be easy marks. And every jurisdiction would enact their own retaliatory tax. *Cf. Nat'l Private Truck Counsel* v. *Okla. Tax Comm'n*, 515 U.S. 582, 584 (1995). States and their subdivisions would be forced to negotiate tax rates and bilateral trade agreements with each other on essential fuels as if they were foreign sovereigns, and they could "drift

toward anarchy and commercial warfare." *H.P. Hood & Sons* v. *Du Mond*, 336 U.S. 525, 533 (1949). "Avoiding this sort of 'economic balkanization,' and the retaliatory acts of other States that may follow, is one of the central purposes of [this Court's] negative Commerce Clause jurisprudence." *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 577 (1997) (citation omitted).

Given the unique facts of this case, the court below correctly held that a Texas taxing authority cannot tax Peoples—which effectively becomes a tax on citizens of Chicago who have no connection with the jurisdiction and no redress at the polls—by levying a tax on the value of a commodity concededly in interstate commerce. That fact-intensive ruling by an intermediate state appellate court does not warrant this Court's extraordinary intervention.

V. THIS CASE IMPLICATES NO BROADER CONCERNS ABOUT TAXES ON OTHER KINDS OF PROPERTY.

The ruling below will not have the broader effects the District "envisions." Pet. 19-20. The District wrongly contends that this case implicates the validity of other "real or personal property" taxes levied on entities without a physical presence in the jurisdiction. *Id.* at 20.

Because real estate never moves in interstate commerce, the issues in this case are irrelevant to such taxes. And taxes on other kinds of property will almost always have a greater nexus than exists here, because one will be able to identify an owner who has at least some control over what happens to the property. As explained above, the Texas Court of Appeals did not hold that physical presence was a

prerequisite to finding a substantial nexus, only that another nexus must exist where physical presence is lacking. It found no such nexus given the virtually unique circumstances of a party that was deemed the technical owner by default of an untraceable, allocated portion of a commodity moving in interstate commerce over which the party has no control. Tangible personal property is rarely so fungible and intermingled as to involve imputing ownership to a party that has no control over the property and no right to access it, and that specifically contracted to place the property elsewhere.

In its petition, the District asserts that this purportedly broader question implicated by this case was presented in another petition involving whether the "physical presence" test applies only to sales and use taxes. Pet. 20 (citing *Asworth, LLC* v. *Dep't of Rev., Finance, & Admin. Cabinet*, No. 10-662). Since then, the Court has denied certiorari in *Asworth*. Given that certiorari was not warranted when this broader issue was directly presented, it clearly is not warranted here.

The District and its amici also overstate the breadth of the issue even as it affects natural gas and oil. Amici imply that localities are clamoring to enact such taxes. But since *Complete Auto*, reported decisions in only three states (Oklahoma, Texas and Kansas) have addressed localities' attempts to tax gas or oil stored as part of interstate shipments. *Cf. In re Appeal of the Dir. of Prop. Valuation*, 161 P.3d 755 (Kan. 2007) (disapproving tax on state law grounds). If such a groundswell does appear, and if state courts of last resort eventually conflict on the

issue, the Court can visit the issue then.[3] Even in Oklahoma, however, the issue is narrowly limited to gas originating within that state. In *Missouri Gas*, 234 P.3d at 948-49, 963, the court held that Oklahoma state law would preclude a tax on any gas that originated outside of the state. And as noted above, it is likely that Texas precludes such taxes on numerous state law grounds.

Moreover, in some cases the issue might be resolved on the ground—no longer contested here—that particular gas supplies are not moving in interstate commerce. During the years at issue, North Lansing was the only Texas storage field over which FERC asserted regulatory jurisdiction, 3 RR 147, and it is currently one of only two operating FERC jurisdictional gas fields in the state, *see* FERC, *Jurisdictional Storage Fields in the United States by Location* (www.ferc.gov/industries/gas/indus-act/storage/fields-by-location.pdf). It remains to be seen how the constitutional question would be resolved as to the many other non-jurisdictional fields.

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[3] Recently, a Kansas administrative body ruled on the taxation of stored gas without reaching federal constitutional issues. *See In re Appeals of Various Applicants from an Order of the Dir. of Prop. Valuation*, No. 2009-8554-PV (Kan. Ct. Tax App. Feb. 17, 2011). If that case is litigated further, and if a decision reaches those issues and burdens interstate commerce, the Court would also be able to visit the issue then. *Cf.* Invitation Br. 20-21 (future case could be ripe for review "if facts come to light indicating that such taxes cause a significant disruption in the interstate transport of natural gas or that they cannot be assessed in a fair and non-discriminatory manner").

CONCLUSION

For these reasons, the petition should be denied.

Respectfully submitted,

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